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Number 85 — 1065

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

VINCENT J. BARTIMO,

Petitioner

versus

HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION, HOME INSURANCE COMPANY, THOMAS F. RUSSELL, JR., AND THE RACING JOURNAL,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS BRIEF IN OPPOSITION

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March 21, 1986

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The Respondents, Horsemen's Benevolent and Protective Association, Home Insurance Company, Thomas F. Russell, Jr., and the Racing Journal, Inc., respectfully request that this Court deny the petition for writ of certiorari seeking review of the Fifth Circuit's opinion in this case. That opinion is reported at 771 F.2d 894 (5th Cir. 1985).

Statement of the Facts

The facts of the case are stated fully in the decisions of the District Court (Petitioner's Appendix at A-14) and the Court of Appeals (Petitioner's Appendix at A-1).

Argument

1. THERE IS NO CONFLICT WITH DECISIONS OF THIS COURT OR OTHER COURTS OF APPEALS.

Petitioner claims the decision of the Fifth Circuit Court of Appeals conflicts with decisions of this Court and other Courts of Appeals in that the Fifth Circuit failed to independently examine the whole record in its review of this matter. Specifically, petitioner alleges that the Court of Appeals erred by declining to review the subsidiary factual findings supporting its ultimate determination regarding petitioner's failure to prove actual malice by clear and convincing proof.

The Court of Appeals was cognizant of the duty imposed by *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. _____, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984), to exercise independent judgment in its review of the trial court's finding that petitioner failed to prove actual malice as well as its obligation to indepen-

dently review the entire record in reaching its decision on this issue. See 771 F.2d 894; Appendix at pg. A-3, A-5 and A-6.

With this standard of review in mind, the Court of Appeals analyzed and discussed in detail each alleged defamatory remark in terms of the evidence adduced by petitioner. A review of the Court of Appeals decision leaves no doubt that it did in fact "independently examine" the "whole record" in reaching its decision. Based on that independent examination, the Court affirmed the trial court's decision that petitioner failed to meet his burden of proving actual malice.

The Court of Appeals correctly concluded that under the guidelines set forth by this Court in *Bose, supra,* the proper standard of review did not require review of credibility findings or subsidiary factual findings. The decisions of this Court and other Courts of Appeals cited by petitioner in support of his petition concerning independent review of these matters simply do not support the proposition. *E.g., New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964); *Bose Corp. v. Consumers Union of United States, Inc., supra; Buckley v. Littell,* 539 F.2d 882 (2d Cir. 1976); *McDowell v. Paiewonsky,* 769 F.2d 942 (3d Cir. 1985); *Hardin v. The Santa Fe Reporter, Inc.,* 745 F.2d 1323 (10th Cir. 1984).

2. THE FIFTH CIRCUIT'S DECISION DID NOT HOLD THAT A PUBLIC FIGURE PLAINTIFF FAILS TO MEET THE BURDEN OF SHOWING "ACTUAL MALICE" MERELY BECAUSE SOME OF THE FALSE STATEMENTS ARE PRECEDED BY THE WORD "ALLEGED."

Petitioner contends that the Court of Appeals' opinion placed improper reliance on the use of the word "alleged" preceding certain Mafia allegations in the article in question. It is patently obvious from a reading of the Fifth Circuit decision that its comments concerning the use of the word "alleged" concern the interpretation a reader may give the article and do not afford an unbridled constitutional protection to an author through the use of the word "alleged." In commenting on the use of the word "alleged," the Court below said:

> "The trial and the arguments of counsel below and on appeal focused almost exclusively on Russell's references to Bartimo's alleged ties with the Mafia. At the outset, we note that each reference is prefaced by the word 'alleged.' There is thus the threshold problem of interpreting — or misinterpreting — what Russell intended to say. While the story in its entirety may appear to assert the truth of Bartimo's Mafia ties, it carefully avoids doing so explicitly by using the word 'alleged.' In our view, the "Outrage!" article's reference to Bartimo and the Mafia can be read as no more than a report that Bartimo has, at some time or another, been allegedly connected with the Mafia." 771 F.2d at 899.

Thomas Russell, Jr. testified he relied on statements in an article written by Orville Henry in the June 14, 1979, issue of *The Arkansas Gazette* which suggested that Bartimo was a member of the Mafia. The Court below concluded that the article was susceptible of being interpreted as suggesting that Mr. Bartimo was a member of the Mafia. Significantly, petitioner interpreted the article in this manner. As stated by the Court of Appeals:

> ". . . we think the relevant portion of the article quite susceptible of the interpretation Russell placed upon it. Indeed, Bartimo revealed in his response letter to Henry that he himself interpreted the article as a 'declaration that I am a member of the Mafia.' Bartimo now argues that Russell could not have so interpreted the article but we think it clear that he could have, and, indeed, was quite reasonable in doing so." 771 F.2d at 900.

The Court below was careful to point out that its decision did not preclude recovery by public figure plaintiffs, but did require that they meet the heavy burden imposed upon them to prove their case by clear and convincing evidence. The Court of Appeals made the following comments concerning the plaintiff's failure to meet his burden:

> "It might be asked whether Bartimo could ever have done more to carry his burden or if the case ended when Russell testified under oath that he believed what he wrote. *The answer to the first question can only be that more could have been done.* For instance, Russell's state of mind as to some of the statements was not examined. Also, the telephone call Russell made to Henry was not testified to in detail. It may be that the obscureness of the record is due solely to the procedural disposition of this case. It may be that Bartimo brought out all the testimony in his favor when he had the opportunity and that there simply was not more evidence to adduce. In any event, it is clear to us that our holding leaves ample room for future plaintiffs to maneuver successfully within the *Sullivan* framework. The answer to the second question must therefore be the same "no" as that given by the Court in *St. Amant,* 390 U.S. at 732,

88 S. Ct. at 1326. *The case ended not when Russell testified to his own good faith, but when Bartimo failed to show that Russell subjectively doubted or recklessly disregarded the truth of the statements."* [Emphasis added.] 771 F.2d at 901.

Obviously, the Court of Appeals was of the opinion that more could have been done by the petitioner to meet his burden of proof. However, petitioner failed in that regard and the Court of Appeals correctly affirmed the decision of the trial court.

3. THE COURT OF APPEALS DECISION DID NOT INSULATE FALSE STATEMENTS MERELY BECAUSE THEY ARE FOUND TO BE THE PRODUCT OF LITERARY LICENSE.

Petitioner's final allegation is that the Fifth Circuit has unfairly insulated false statements from actions for liable where they are found to be "merely the product of literary license." The Court of Appeals in no way suggests that constitutional protection be afforded allegedly libelous statements that are "merely false or the product of literary license." On the other hand, the Court of Appeals, citing *New York Times Co. v. Sullivan, supra, Time, Inc. v. Pape*, 401 U.S. 279, 91 S.Ct. 633, 28 L.Ed.2d 45 (1970), *Herbert v. Lando*, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979), and *Bose Corp. v. Consumers Union of United States, Inc., supra,* did make reference to a well established principal of First Amendment liable law requiring proof of actual malice in defamation cases involving public officials.

Petitioner's construction of the Court of Appeals' decision is strained. The Court of Appeals did not say that actual malice is not shown because the statements are "merely false or the product of literary license."

What the Court did say, however, is that recovery is not justified absent a finding of actual malice in addition to falsehood in order for a public figure to recover in a defamation action.

This Court has uniformly and consistently held that in order for a public figure plaintiff to recover in an action for defamation, he must prove by clear and convincing evidence that the statements were made with actual malice. Actual malice has been defined to be with knowledge that a statement was false or with reckless disregard of whether it was false or not. See *New York Times v. Sullivan, supra.* Petitioner simply failed in his burden of proof.

Summary of Argument

Petitioner, Vincent J. Bartimo, has applied to this Court for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit urging two basic reasons in support of granting the Writ. Initially, petitioner asserts that the decision of the Court of Appeals conflicts with decisions of this Court as well as other Courts of Appeals by failing to make an independent examination of the whole record in determining whether petitioner has met his heavy burden of proving actual malice and by declining to review the subsidiary factual findings supporting the ultimate determination regarding actual malice.

A review of the Court of Appeals' opinion clearly establishes that the Court of Appeals made an exhaustive review of the entire record in reaching its decision.

Insofar as the Court of Appeals' failure to review the subsidiary factual findings supporting the ultimate determination regarding actual malice, it is the position

of respondents that no such review is required under the decisions of this Court or the other Courts of Appeals.

Petitioner's second reason in support of his petition involves the resolution by the Court of Appeals of two fact questions which allegedly make it virtually impossible for a plaintiff to prevail in a First Amendment libel action. These fact questions involve the use of the word "alleged" to precede certain allegations and some imagined protection of statements which are the product of literary license. Respondents respectfully submit that the Court of Appeals' decision does not support the conclusions suggested by petitioner and that the Court of Appeals clearly did not expand the ambit of constitutional protection afforded by the First Amendment.

Conclusion

This petition for Writ of Certiorari should be denied for the reasons discussed above.

Respectfully submitted,

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